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IN THE

Supreme Court of the United States

October Term, 1957.

No. 915

MICHELE DESSI,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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TABLE OF CONTENTS OF BRIEF.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision and the Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Argument	8
Conclusion	17
Appendix	19
Opinion of the Court of Appeals for the Third Circuit Dated January 13, 1958	19
Final Judgment	24

TABLE OF CASES CITED.

Page

Anderson v. Atlantic Coast Line, 350 U. S. 807, 76 S. Ct. 60 (1955) 11

Atlantic Coast Line v. Anderson, 221 F. 2d 548 (C. A. 5, 1955) 10

The Baltimore and Ohio Railway Company v. Jackson, 353 U. S. 325, 77 S. Ct. 842 (1957) 11, 12

Baltimore & O. R. Co. v. Postum, 177 F. 2d 53 (C. A. D. C., 1949) 10

Ellis v. Union Pac. R. Co., 329 U. S. 649, 67 S. Ct. 598 (1947) 7

Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077 (1943) 10

Girouard v. United States, 328 U. S. 61, 66 S. Ct. 826 (1946) 5

Kernan v. American Dredging Company, U. S. , 78 S. Ct. 394 (1958) 12

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946) 5, 6, 7, 9, 10, 12, 13, 15

Lukon v. Pennsylvania Railroad Company, 131 F. 2d 327 (C. A. 3, 1942) 6, 13

McBride v. Toledo Terminal Railroad Company, 345 U. S. 517, 77 S. Ct. 1398 (1957) 5, 6, 9, 15, 16

Minneapolis & St. Louis Railroad Company v. Bombolis, 241 U. S. 211, 36 S. Ct. 595 (1916) 11

Norwood et al. v. Kirkpatrick, etc., 349 U. S. 29, 75 S. Ct. 544 (1955) 11

Pennsylvania Railroad Company v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391 (1933) 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 18

Reed v. Pennsylvania Railroad Company, 351 U. S. 502, 76 S. Ct. 958 (1956) 11

Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443 (1957) 5, 7, 9, 13, 15

Schulz v. Pennsylvania Railroad Company, 350 U. S. 523, 76 S. Ct. 608 (1956) 6

Shields v. Atlantic Coast Line Railroad Company, 350 U. S. 318, 76 S. Ct. 386 (1956) 12

TABLE OF CASES CITED (Continued).

	Page
Stinson v. Atlantic Coast Line R. Co., U. S. 78 S. Ct. 136 (1957)	6, 16
Southern Pacific Company v. Gileo et al., 351 U. S. 493, 76 S. Ct. 952 (1956)	12
Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944)	6, 10
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444 (1943)	10
Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413 (1949)	7

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. Sec. 1254(1)	2
Constitution of the United States, Amendment VII	2
The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404]	2, 3, 6

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No.

MICHELE DESSI,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To The Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

MICHELE DESSI, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 13, 1958.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found in 251 F. 2d 149 (C. A. 3, 1958). This is the final judgment of the United States Court of Appeals for the Third Circuit where judgment was entered for Respondent affirming the judgment of the United States District Court for the Eastern District of Pennsylvania.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 13, 1958 (24). The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Are conflicts between circumstantial evidence and affirmative evidence to be resolved by the jury in cases under the Federal Employers' Liability Act?

2. Was not the action of the court below in setting aside the jury's verdict, which was based upon petitioner's circumstantial evidence, a denial of petitioner's rights under the Seventh Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISION AND THE STATUTE INVOLVED.

1. Constitution of the United States, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404], the pertinent portion of which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Terri-

tories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE.

This is an action under the Federal Employers' Liability Act, 45 U. S. C. § 61 et seq. The jury, after ample instructions by the trial judge, rendered a verdict for petitioner. Respondent's motions for judgment and a new trial were filed and the trial judge granted the motion for judgment. The Court of Appeals for the Third Circuit affirmed the judgment for Respondent.

Petitioner, who was sixty-three years old at the time of trial and had been employed by respondent since 1925 (4a), was injured on November 25, 1953, when he was struck in the head by a jack handle and knocked unconscious (10a). The accident occurred when a gondola car was being jacked in order to put wedges in the journal box (35a). In that situation the entire weight of the car is on the jack (35a).

On the day of the accident respondent was working as a mechanic in the car shops in Altoona (4a). In the car

shops there were five numbered tracks in the open and in addition there were the storehouse track and the paint track (4a). The paint track was nothing but soft, smouldering ground filled in with paper, cinders, old ties, dirt, rubbish, ashes and sand (7a, 19a, 22a, 49a). The sand came from the cars which had been sandblasted (7a, 49a). Respondent's witnesses admitted that this was the composition of the ground (117a).

Petitioner testified that this was the first time he had jacked a car on the paint track (11a). In this he was corroborated by two witnesses for the respondent who said they had never jacked a car on the paint track before. These two witnesses were Mr. Holes, a gang foreman since 1948, and Hoffman, petitioner's helper (98a, 108a). Indeed, the few times that an employee had been sent to jack a car on the paint track, the union representative had complained that the ground there was unsafe (37a). Petitioner further proved that on the very day of this accident when he was ordered to go to the paint track, he protested but was forced to yield to his foreman's orders (7a).

When petitioner went down to the paint track the car on which he was to work was coupled to other cars and it was shown that a coupled car should not be jacked (7a, 11a, 18a, 43a).

In addition to showing the unsafe character of the place where he was compelled to work and the dangerous circumstances of the coupled cars, petitioner also proved that there was a safe or safer method which should have been used. He had done this work before on four other tracks because the ground was solid and because proper and adequate equipment was available there (11a). Although the proper method was to use two twenty-ton jacks to get the weight of the car off the truck (11a, 48a), petitioner was only supplied with a single fifteen-ton jack (30a).

This accident could only have occurred because the jack was defective, the place where the jacking was done was unsafe or because the jack was improperly operated. Respondent argued the last of these possibilities. The

trial judge specifically charged that the jury could not find liability based upon a defective jack (131a). He also charged that if the jury found petitioner improperly operated the jack and that this was the sole cause of the accident, there should be a verdict for respondent (131a). The verdict was for petitioner. Therefore, the jury could only have found liability on the ground that the unsafe place where petitioner was ordered to do the jacking caused the accident. The jury could have and obviously did find that either the unsafe condition of the ground caused the jack to shake, tilt or sink, or that the failure to uncouple the cars plus the insufficiency of the jacking equipment, or a combination of these caused the jack handle to fly out (39a, 40a, 43a).

Following its application of a rule of law which forms the core of a question presented here for review, the court below found that although there was negligence, such negligence of respondent did not contribute to the accident, in whole or in part, and affirmed the entry for respondent.

REASONS FOR GRANTING THE WRIT.

1. The decision below is erroneously based upon a rule of law promulgated in *Pennsylvania Railroad Company v. Chamberlain*, 288 U. S. 333, 53 S. Ct. 391 (1933) which is ripe for re-examination and overruling [Cf. *Girouard v. United States*, 328 U. S. 61, 66 S. Ct. 826 (1946)]:

(a) The court below erroneously construed respondent's oral evidence as "uncontradicted affirmative evidence to the contrary";

(b) The court below then erroneously held that a jury may not draw inferences from circumstantial evidence when there is contrary "affirmative evidence" on the other side. This application is in conflict with the decisions of this Court in *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *McBride v. Toledo Terminal Railroad Company*, 354 U. S.

517, 77 S. Ct. 1398 (1957); *Schulz v. Pennsylvania Railroad Company,* 350 U. S. 523, 76 S. Ct. 608 (1956). It is also in conflict with the decision of the Third Circuit in *Lukon v. Pennsylvania Railroad Co.,* 131 F. 2d 327 (C. A. 3, 1942).

2. The question of the continued authority of the rule of law in the *Chamberlain* case, *supra,* is of dominating public importance because that rule pulverizes every claim for relief under the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq. in which a beneficiary under the Act must prove his case circumstantially against a defendant's case proven "affirmatively". Untold numbers of such cases of necessity arise from railroad accidents which leave beneficiaries of the Act widowed, amnesic or unconscious. Thus where railroads can produce any witness who testifies "affirmatively" against the inference plaintiff produces from his necessarily circumstantial evidence, no matter how incredible, hostile or biased the witness may be, the rule in *Chamberlain* will force results directly in conflict with the decisions of this Court in *Schulz v. Pennsylvania Railroad Company,* 350 U. S. 523, 76 S. Ct. 608 (1956) and *Stinson v. Atlantic Coast Line R. Co.,* U. S. 78 S. Ct. 136 (1957).

3. The decision below takes from the jury the right to pass upon credibility, draw inferences and discard or disbelieve that which is inconsistent with its conclusion. This is in direct conflict with the decision of this Court in *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946).

4. The decision below deprives petitioner of his rights to trial by jury under the Seventh Amendment to the Constitution of the United States and in conflict with *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946).

5. In denying petitioner his right to a jury trial, the decision conflicts with the command of this Court in *Tennant v. Peoria & P. U. Ry. Co.,* 321 U. S. 29, 64 S. Ct. 409

(1944), and *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946), and therefore, "special and important reasons for the grant of certiorari" exist: *Rogers v. Missouri Pacific Railroad Company, supra,* at 352 U. S. 510, 77 S. Ct. 451; and See *Wilkerson v. McCarthy,* 336 U. S. 53, 69 S. Ct. 413 (1949) and *Ellis v. Union Pac. R. Co.,* 329 U. S. 649, 67 S. Ct. 598 (1947).

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction . . ." *Rogers v. Missouri Pacific Railroad Co., supra,* 352 U. S. 509, 77 S. Ct. 450.

ARGUMENT.

One of the bases of causal negligence relied upon below by petitioner was the fact that he was ordered to work, over his protest, on soft, rubbishy, sandy, smouldering, loose fill (7a, 19a, 22a, 49a). From this evidence the jury could reasonably have inferred that the jack sank or tilted, releasing the offending handle. As to this, the court below said: (20).[1]

> "* * * And there was no such showing concerning the consistency of the ground that a sinking could properly be inferred in the teeth of the uncontradicted affirmative evidence to the contrary. *Cf. Pennsylvania R. R. Co. v. Chamberlain,* 1932, 288 U. S. 333 . . ."

The *Chamberlain* case relied upon below held two things: (1) that where the evidence gives support to each of two inconsistent inferences, the party having the burden of sustaining one as against the other can not prevail; (2) that where recovery depends upon inference from proven facts, the inference can not be drawn in the face of the opponent's affirmative evidence that the fact did not exist. It was the second phase of the *Chamberlain* holding that the lower court mistakenly thought applied here.

Respondent's evidence was not "uncontradicted affirmative evidence to the contrary." The lower court itself says: "Neither he nor his helper, whose back was turned, nor anyone else, saw or knows just what happened" (20). There was no eyewitness testimony as to what happened *at the time* of the accident. And the best that can be said for the testimony as to the position of the jack after the accident was that it was still bearing the weight of the car.[2] There was no testimony that it had not

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1. All subsequent references to the opinion below are to that opinion as paginated in the Appendix to this Petition.

2. Although petitioner, on cross-examination, referring to a time before the accident, said the ground did not "cave in", he also said that after the accident, he did not look to see if it had sunk or the jack was still bearing the weight of the car (23a, 24a), so that "At best,

sunk and there was absolutely nothing to exclude the reasonable inference of a momentary tilting because of the condition of the ground. There were, therefore, only conflicting inferences to be drawn from the evidence, and the case is therefore governed by *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946) and the host of cases that followed.

The reliance upon *Chamberlain* was therefore the application of a wrong rule of law and demands reversal: *Cf. Rogers v. Missouri Pacific Railroad Co.,* 352 U. S. 500, 562, 77 S. Ct. 443, 480 (1957); *McBride v. Toledo Terminal Railroad Company,* 354 U. S. 517, 77 S. Ct. 1398 (1957).

However, for aught that appears in the opinion, there *was* affirmative evidence to the contrary. With this apparent justification, the lower court relied upon *Chamberlain.* That is the real vice of the opinion below. The inescapable result is a precedent which applies and perpetuates a principle that has no logical or legal validity in view of the decisions of this Court. The holding below that the jury is not free to draw a circumstantially supported inference and discard or disbelieve affirmative oral evidence inconsistent with its conclusion is a radical revision of the jury-power rule of *Lavender v. Kurn*[3] that:

> ". . . the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion."

Lavender v. Kurn, supra, was decided in 1946. This Court has never since followed either phase of the *Chamberlain* holding in a Federal Employers' Liability Act case. Indeed, in 1943, three Justices of the Court characterized its first phase as among "New and totally unwarranted formulas, which should surely be eradicated at the first opportunity . . .": Dissent of Justices Black, Douglas and

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uncertainty as to the fact arises from the petitioner's testimony, and in that circumstance not the court, but the jury, was the tribunal to determine the fact." *Rogers v. Missouri Pacific Railroad Co., supra* at 325 U. S. 504, 77 S. Ct. 447.

3. 327 U. S. 645, 653, 66 S. Ct. 740, 744 (1946).

Murphy in *Galloway v. United States,* 319 U. S. 372, 404, 405, 63 S. Ct. 1077, 1094 (1943).

Since the criticism in *Galloway* and the holding in *Lavender,* at least one court, after reviewing *Tiller v. Atlantic Coast Line R. Co.,*[4] and *Tennant v. Peoria & P. U. R. Co.,*[5] convincingly decided with direct reference to *Chamberlain,* that the first phase of its holding does not ". . . represent the accepted view of the law". *Baltimore & O. R. Co., v. Postum,* 177 F. 2d 53, 55 (C. A. D. C., 1949).

The first phase of the *Chamberlain* holding has thus been cast in a most dubious light and can fairly be said to be a discredited rule. Its companion ruling—the second phase of the *Chamberlain* holding—is now here because the court below anomalously saw fit to quicken it when the history of Chamberlain's treatment by the courts, the great unbroken stream of jury-power cases flowing from the *Lavender v. Kurn* holding and the root constitutional considerations of the Seventh Amendment should have compelled a conclusion that this rule in *Chamberlain* should not be and is no longer the law.

It was in the light of these same considerations—the clear tenor of this Court's opinions and the Seventh Amendment thrust—that Judge Holtzoff's conclusion in *Postum* as to the first phase of *Chamberlain* was inevitable. It was inevitable even in the absence of an explicit assertion by this Court overruling *Chamberlain,* for the set of the current was apparent from the bank. The second phase of *Chamberlain* must be swept in the same direction.

In *Atlantic Coast Line v. Anderson,* 221 F. 2d 548, (C. A. 5, 1955), the court relied upon the *Chamberlain* case to reverse a verdict for the plaintiff in a suit under the F. E. L. A. In that case the Fifth Circuit said (p. 551):

> "The undisputed and unimpeached evidence of the engineer, the only eyewitness, establishes that this could not have been done, and it is settled law that,

4. 318 U. S. 54, 63 S. Ct. 444 (1943).
5. 321 U. S. 29, 64 S. Ct. 409 (1944).

with the record standing thus, the jury may not disregard his testimony to turn to speculation. Pennsylvania Ry. Co. v. Chamberlain, 288 U. S. 333, at page 341, 53 S. Ct. 391, 77 L. Ed. 819".

This Court, in a per Curiam order, granted certiorari and reversed. Justices Reed, Frankfurter, Burton and Harlan were of the opinion that certiorari should not have been granted: *Anderson v. Atlantic Coast Line,* 350 U. S. 807, 76 S. Ct. 60 (1955).

This Court's per Curiam reversal of *Anderson* might be fairly susceptible of two readings:

(1) Since the Court of Appeals in *Anderson* squarely relied upon the second phase of the *Chamberlain* rule, this Court's reversal of that holding may mean that *Chamberlain* is no longer law. If this be so, then the decision below is the application of a wrong rule of law and the grant of the petition and a reversal of the judgment below are manifestly indicated.

(2) In reality, however, the *Anderson* case did not properly present for decision the validity of the *Chamberlain* rule. Proof-wise, it was not a case of circumstantially proven inferences against contrary affirmative evidence. It was, therefore, the invocation of a rule which actually had no place in the decision. The petition for the writ in *Anderson* expressly demonstrates that the sole question presented for review by this Court was the sufficiency of the evidence under the F. E. L. A. and the Seventh Amendment.

We humbly suggest that had *Anderson* presented the important and novel legal issue of the applicability of *Chamberlain* to F. E. L. A. cases, the whole Court would have considered the merits of this question of nationwide importance: *Cf. Minneapolis & St. Louis Railroad Company v. Bombolis,* 241 U. S. 211, 36 S. Ct. 595 (1916); *Reed v. Pennsylvania Railroad Company,* 351 U. S. 502, 76 S. Ct. 958 (1956); *Norwood et al v. Kirkpatrick, etc.,* 349 U. S. 29, 75 S. Ct. 544 (1955); *The Baltimore and Ohio Railway Com-*

pany v. Jackson, 353 U. S. 325, 77 S. Ct. 842 (1957); *Shields v. Atlantic Coast Line Railroad Company,* 350 U. S. 318, 76 S. Ct. 386 (1956); *Southern Pacific Company v. Gileo et al.,* 351 U. S. 493, 76 S. Ct. 952 (1956); *Kernan v. American Dredging Company,* U. S. , 78 S. Ct. 394 (1958).

This case then presents a truly novel, important and eminently reviewable question for decision by this Court. We respectfully submit that where there is a conflict between circumstantial and oral affirmative testimony, the conflict must be resolved by the jury under the Seventh Amendment and the Federal Employers' Liability Act. The contrary dictate of the *Chamberlain* rule is therefore wrong. It should now be overruled by name.

The decision in *Chamberlain,* and hence the decision below bottomed upon it, are in direct conflict with decisions of this Court under the Federal Employers' Liability Act beginning with *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946).

First: Lavender lays down the rule (327 U. S. pp. 652-653, 66 S. Ct. p. 744) that:

> "Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

Under the *Chamberlain* rule, adopted by the lower court, the jury's function of judging the credibility of witnesses disintegrates. It becomes of no moment that the jury may have regarded the "affirmative" witnesses as unbelievable, for the jury never had the chance to pass on the question. In fine, under *Lavender* the jury judges credibility. Under *Chamberlain,* it does not.

Second: Lavender holds (327 U. S. p. 653, 66 S. Ct. p. 744) that:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts

are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those *whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.*" (Emphasis supplied.)

Chamberlain says that although facts are in dispute and the evidence is such that fair-minded men may differ, the fact-finders may not choose what seems to them the most reasonable inference for the sole reason that one side is circumstantial and the other "affirmative". Under the *Lavender* rule, the jury's finding here must stand. Under the *Chamberlain* rule, it must not.

Third: Lavender tells us (327 U. S. p. 653, 66 S. Ct. p. 744) that:

> ". . . the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion."

Chamberlain tells us the direct opposite. Under *Lavender,* the jury could have disregarded and disbelieved the "affirmative" oral evidence of defendant's witnesses. Under *Chamberlain,* the court had to accept that evidence.

Fourth: Chamberlain (and the court below) announce that we can not accept circumstantial evidence in the face of direct testimony.

The court below had previously said in *Lukon v. Pennsylvania Railroad Company,* 131 F. 2d 327, 329 (C. A. 3, 1942):

> ". . . Although there was no witness who actually saw Lukon struck, there was ample circumstantial evidence to indicate how he was injured. Such evidence has probative value equal to that of testimonial evidence."

This Court, in *Rogers v. Missouri Pacific Railroad Co.,* 352 U. S. 500, 508, 77 S. Ct. 443, 449 (1957) states that:

> "The burden of the employee is met, and the obligation of the employer to pay damages, arises,

where there is proof, even though entirely circumstantial, from which the jury may with reason make that inference [of causal negligence]."

And in the footnote to that statement (footnote seventeen):

"Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. The Robert Edwards, 6 Wheat. 187, 190, 5 L. Ed. 238."

Thus the Third Circuit is at war with itself and with this Court. *Chamberlain* is equally at war with the later holdings of this Court and with its expressed philosophy.

In order to understand the overwhelming consequences of the *Chamberlain* rule we need merely turn to this case. The lower court said (20):

"And there was no such showing concerning the consistency of the ground that a sinking could properly be inferred in *the teeth of the uncontradicted affirmative testimony to the contrary. Cf. Pennsylvania R. R. v. Chamberlain,* 1932, 288 U. S. 333." (Emphasis supplied.)

Using this statement as a basis, the court below concluded in the very next sentence (20):

"We conclude, *therefore,* that there is no evidentiary basis for a rational inference that the alleged behavior of the jack handle was to any extent caused by the condition of the ground upon which it was being used." (Emphasis supplied.)

Thus, the lower court ruled, not that petitioner's circumstantial evidence was intrinsically insufficient, but that it was extrinsically insufficient under *Chamberlain* because of the countervailing direct testimony. Once that conclusion of extrinsic insufficiency had been reached, the conclusion that there was no evidentiary basis for a "rational

inference'' was inescapable. This must be so, for once the affirmative evidence appeared, the lower court regarded petitioner's circumstantial evidence as utterly without significance.

To say this is to reveal at once the appallingly mechanical operation of the *Chamberlain* rule. Under it, the issue is determined without any evaluation of the proof, save the extrinsic inquiry of whether it is circumstantial on the one hand and direct on the other. Thus, it compels an *a priori* determination of an issue which by all teachings of human experience can only be determined rightly by the use of man's reason with all that implies: evaluating behavior, testing credibility, interest, bias and observation,—in short, the composite thought-processes of a jury.

The *Chamberlain* rule works a double havoc: it evicts the jury from its constitutional role as the judge of credibility and of ultimate truth, and then leaves the court with little, if anything, to do in evaluating the detailed facts of the record independently. The lower court's treatment of the record here is vivid proof that this is indeed the impact of *Chamberlain* upon the courts.

Petitioner's affirmative testimony showed the precise nature of the ground where he was ordered to do his job. It was soft, rubbishy, sandy, smouldering, loose fill (7a, 19a, 22a, 49a). Clearly, absent the rule of disappearing proof adopted by the court below, the decisional law which developed between *Lavender v. Kurn, supra,* and *Rogers and McBride, supra,* would overwhelmingly command the conclusion that this affirmative evidence was unquestionably sufficient to support an inference that the jack sank or tilted with the consequent accident and injury.

In characterizing the record, the court below said merely that the ground at the site was ''less firm'' (20) sandy, smouldering, loose fill. Obviously, the ground could be ''less firm'' than other ground and still support the jack, and to weigh the circumstantial value of petitioner's

testimony, it was critical to treat it with precision and not by the diluted characterization of "less firm". But the court below did not do this, not because of a desire to distort, but merely because petitioner's evidence had become unimportant to the court. The petitioner's evidence could only have become unimportant because the court felt impelled to accept affirmative evidence and to reject countervailing circumstantial evidence. Indeed, once it accepted the rule of disappearing proof it had no other choice but to reject that circumstantial evidence.

The same rule of disappearing proof explains the lower court's failure to find in the record, probative facts which, "with reason", supported inferences of negligence and causation. Certainly, no one reading the facts in *McBride v. Toledo Terminal Railroad Company,* 345 U. S. 517, 77 S. Ct. 1398 (1957) and *Stinson v. Atlantic Coast Line Railroad Company,* U. S. , 78 S. Ct. 136 (1957) could doubt for an instant that petitioner's proof here, given its full strength, created a jury issue. But the lower court appears not to have read the facts in those cases, again not because of indifference, but because it deemed them unimportant. So far as the lower court was concerned, petitioner's proof here had simply been obliterated by respondent's affirmative evidence. Petitioner's record just no longer existed. And from a record where petitioner's evidence was, in effect, non-existent, of course neither negligence nor causation could be inferred, "with reason." Any other result would have been unreasonable.

The obvious and completely devastating effect of the decision below is to rob F. E. L. A. employees of an important aspect of Seventh Amendment rights—the right to prove a case by inference. It says very bluntly that where inferentially proven facts are contradicted by affirmative evidence, even though oral, that oral evidence *must* be believed.

The application of such a rule to Federal Employers' Liability Act cases is ruinous. Countless actions are

brought under this Act by widows or by those rendered amnesic or unconscious by their accidents. They must often rely on circumstantial evidence alone. Under the rule applied below, just claims would be defeated by the production of even a single live witness who may be hostile, biased, mistaken or incredible. Inevitably, witnesses for Federal Employers' Liability Act defendants are the defendants' own employees. The interests of these witnesses are often allied with those of the defendant; but, says the court below, such witnesses must be believed.

The lower court's summary abolition of the right to prove a case by inference is a massive invasion of the classic jury province. From time immemorial jurors, enlightened by experience, observing attitude, demeanor and appearance, testing probabilities and witnesses' opportunity for accurate observation, probing bias, and finally reaching a composite view, have passed upon the credibility of other human beings who came before them as witnesses.

The court below destroyed all of that. It said in effect: the jury may have been favorably impressed by the demeanor and attitude of petitioner's witnesses. It may have been skeptical of respondent's witnesses. Based upon its impressions, formed by observation, it may have concluded to believe petitioner's evidence and draw the inferences sought and to disbelieve the respondent's contradictory witnesses and reject their "affirmative" evidence. The lower court now says the jury can not do this, but must accept at face value the testimony which the twelve rejected.

CONCLUSION.

Petitioner in this case is an illiterate (126a, 127a) laborer. His accident rendered him unconscious (10a). He had not a single friendly eyewitness. And the type of witnesses who opposed him is perhaps best exemplified by the man (Harnden) who was willing to have this totally

illiterate petitioner's "X" on a statement which said "I have read the above statement in its entirety and it is true and correct to the best of my knowledge" (123a). Or perhaps by the man (Hertig) who averred that a freight car could be jacked effectively upon a sandy beach (114a).

It is hardly surprising that the jury disbelieved respondent's witnesses and accepted petitioner's proof, which had to be circumstantial because of his unconsciousness. The monstrous result of the decision below is to vitiate that acceptance and to breathe the fragrance of verity into otherwise dank testimony.

This is no isolated situation. Michele Dessi is a prototype. There are literally thousands of Dessis throughout this country who are now faced with this intolerable and indeed, insurmountable rule of proof. This case is important, of course, to petitioner. But its wide-flung implications will inevitably be felt by many men or their widows in many courts of many states and circuits. This is the inescapable impact of the *Chamberlain* rule, perpetuated by the holding below.

We submit that the *Chamberlain* rule subverts the command of the Congress and authority of this Court's recent law. The writ should issue; *Chamberlain* should be overruled by name and the decision below should be reversed.

Respectfully submitted,

JOSEPH S. LORD, III,
CHARLES A. LORD,
SEYMOUR I. TOLL,
Counsel for Petitioner.

RICHTER, LORD & LEVY,
Of Counsel.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,261

MICHELE DESSI,
Appellant

v.

PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued Nov. 19, 1957

Before BIGGS, *Chief Judge;* GOODRICH and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 13, 1958)

HASTIE, *Circuit Judge.*

In this Federal Employers' Liability Act case the appellant Dessi, plaintiff below, asks us to reverse a judgment entered for the defendant, notwithstanding a jury verdict for the plaintiff on his personal injury claim. The dis-

trict court reasoned that the evidence offered no rational basis for a conclusion that the plaintiff's injury, in the language of the statute, "result[ed] in whole or in part" from the railroad's negligence. We must now decide whether there was a jury question on the issue of causation.

Plaintiff, a sixty-three year old mechanic, was rendered unconscious just after he had jacked up one corner of a railroad car. Neither he nor his helper, whose back was turned, nor anyone else, saw or knows just what happened. It was plaintiff's theory, and one of the possibilities under the evidence, that the handle of the jack suddenly moved in such a way as to strike plaintiff on the back of his head and to knock him unconscious. But beyond this the plaintiff had to provide the jury with some rational basis for concluding that some negligence of the railroad helped cause the jack handle to behave in this way. *Gill v. Pennsylvania R.R.*, 3d Cir. 1953, 201 F.2d 718.

There was evidence that for the operation in question the defendant had imprudently placed the car on a track where the ground was less firm than it was alongside nearby tracks customarily used for such work. But such lack of care in selecting a place for this work could be causally connected with the accident only if the jack sank into the ground or tilted somewhat, thus becoming "offsprung" and causing the handle to fly up. All of the affirmative evidence on this point—and there was a substantial amount—indicated that this jack, which was mounted on a block, did not tilt or sink into the ground at all, but remained upright in proper position after the accident. And there was no such showing concerning the consistency of the ground that a sinking could properly be inferred in the teeth of the uncontradicted affirmative evidence to the contrary. *Cf. Pennsylvania R.R. v. Chamberlain,* 1932, 288 U.S. 333. We conclude, therefore, that there is no evidentiary basis for a rational inference that the alleged behavior of the jack handle was to any extent caused by the condition of the ground upon which it was being used.

Next, it is suggested that some imperfection or defective condition of the jack, which reasonable inspection would have disclosed, caused an abnormal movement of the handle. But neither at trial nor on this appeal has any supposed defect even been identified, much less characterized as one which reasonable inspection might have disclosed. To the contrary, there was affirmative evidence that the jack was in good condition and working properly.

Again, there is some suggestion that prudence would have indicated the use of a heavier jack for this job. But it is agreed that the jack actually used was of fifteen ton capacity, and there is nothing from which one could rationally conclude that lifting one corner of a car a few inches, as was done here, was likely to or did in fact overburden the jack. There is no evidence whatever that the jack moved or shifted in any way or failed properly to sustain the weight it was supporting. It appears merely that after the plaintiff fell to the ground, the handle of the jack was also lying on the ground.

In these circumstances it has become necessary for the plaintiff to argue, as he does in his brief, "that if the plaintiff merely proved that there was a safer method of doing the job and he was then knocked unconscious and then saw the jack handle on the ground he would be entitled to have the jury pass upon the issue of whether the failure to adopt the safer method caused the accident *in part*." For this position plaintiff finds support in the view, recently expressed by the Court of Appeals for the Seventh Circuit, that "it will be seen from . . . three cases decided in 1957 [*Rogers v. Missouri Pac. R.R.*, 352 U.S. 500; *Webb v. Illinois Central R.R.*, 352 U.S. 512; and *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521] that the majority of the United States Supreme Court now take the position that jury verdicts under the F.E.L.A. can be permitted to stand even though based solely on speculation." See *Gibson v. Elgin, J. & E. Ry.*, 7th Cir. 1957, 246 F.2d 834, 837. Moreover, Mr. Justice Harlan, dissenting in the three cited

cases, which were decided at the same time, said that their "implication seems to be that the question, at least as to element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is any scintilla of evidence at all to justify the jury verdicts." 352 U.S. 559, 564. But, as we read Mr. Justice Brennan's majority opinions the Court did not purport to do, or view its decisions as doing, what the dissenting Justice thought was being done.

In the first of the group of three decisions, *Rogers v. Missouri Pac. R.R.*, 1957, 352 U.S. 500, the Court had this to say about proof of causation under the Federal Employers' Liability Act:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506.

This language indicates that the role of a defendant's negligence in helping bring about the injury may be small. It does not suggest that an F.E.L.A. plaintiff can carry his burden of proof without evidence that the role was real. Indeed, the paragraph containing the quoted sentence continues with this observation:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." 352 U.S. at pages 506-7, 77 S. Ct. at page 448.

The repeated use of the phrase "with reason"—it appears three times in this short paragraph—is a persuasive indication that the court intended no departure from the familiar and normal requirement of our jurisprudence, as repeatedly

stated in its own rather recent decisions, that the party with the burden of proof must "present probative facts from which the negligence and the causal relation could reasonably be inferred." See *Tennant v. Peoria & P.U. Ry.*, 1944, 321 U.S. 29, 32; *Myers v. Reading Co.*, 1947, 331 U.S. 477, 485; and compare the rationalization in *Lavender v. Kurn*, 1946, 327 U.S. 645, 653.

It is also to be considered whether the more recent *per curiam* decisions in *McBride v. Toledo Terminal Rd. Co.*, 1957, 354 U.S. 517 and *Stinson v. Atlantic Coast Line R.R.*, No. 442, CCH Supreme Court Reports at 56, November 18, 1957, lend significant support to appellant's view of the Supreme Court's present position. Both of these *per curiam* opinions cite *Rogers v. Missouri Pac. R.R., supra*, telling us no more than that, applying the *Rogers* rationale, the Court has found jury questions in these latest cases. They suggest no doctrinal departure from the *Rogers* case, upon which we already have commented.

Accordingly, we hold that the absence of evidence, either circumstantial or direct, tending to show that negligence of the defendant had any influence or effect in causing plaintiff's injury, justified the entry of judgment notwithstanding the verdict in this case. It is not necessary to consider the trial court's alternative position that even if judgment *non obstante* were legally incorrect, a new trial should be ordered.

The judgment will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,261

MICHELE DESSI,

Appellant,

v.

PENNSYLVANIA RAILROAD COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge,* and GOODRICH and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

January 13, 1958

RECEIVED & FILED
Jan. 13, 1958
IDA O. CRESKOFF,
Clerk

INDEX.

	Page
ARGUMENT	1
The Chamberlain Rule Is at the Core of the Decision Below. The Petition Should Therefore Be Granted	1
CONCLUSION	5

TABLE OF CITATIONS.

	Page
Atlantic Coast Line Railroad Company v. Collins, 235 F. 2d 805 (C. A. 4, 1956), cert. denied 352 U. S. 942, 77 S. Ct. 265 (1956)	3
Ferguson v. Moore-McCormack Lines, Inc., 352 U. S. 521, 77 S. Ct. 457 (1957)	4
Herdman v. Pennsylvania Railroad, 352 U. S. 518, 77 S. Ct. 455 (1957)	4
McBride v. Toledo Terminal Railroad Company, 354 U. S. 517, 77 S. Ct. 1398 (1957)	2
Pennsylvania Railroad v. Chamberlain, 288 U. S. 333, 53 S. Ct. 958 (1932)	1, 2, 3, 4, 5, 6
Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443 (1957)	2, 4, 5
Stinson v. Atlantic Coast Line R. Co., — U. S. —, 78 S. Ct. 136 (1957)	2
Webb v. Illinois Central Railroad Co., 352 U. S. 512, 77 S. Ct. 451 (1957)	4
Webster's New International Dictionary of the English Language (Second Edition, Unabridged), p. 2621	3

IN THE

Supreme Court of the United States.

No. 915.

OCTOBER TERM, 1957.

MICHELE DESSI,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

This brief is submitted in reply to respondent's brief in opposition to the Petition for Writ of Certiorari.

ARGUMENT.

The Chamberlain Rule Is at the Core of the Decision Below. The Petition Should Therefore be Granted.

Because of the tremendous importance and effect of quickening the *Chamberlain*[1] rule, respondent is driven to argue:

1. The lower court did not mean to invoke the rule of *Chamberlain.*

2. *Chamberlain* does not mean what it says.

3. Even if *Chamberlain* were not the law, this case would have been decided as it was.

Intertwined with these basic arguments are *ad hominem* accusations of "clever advocacy";[2] going "beyond the

1. *Pennsylvania Railroad v. Chamberlain,* 288 U. S. 333, 53 S. Ct. 958 (1932).

2. Respondent's Brief, pp. 7, 9.

limits of advocacy";[3] choosing "to ignore the present case";[4] having "considerable intestinal fortitude";[5] distorting the opinion;[6] and "a clever bit of sleight-of-hand."[7] There is no need to answer each of these completely unfounded characterizations, for they are all answered by showing that the opinion of the Court of Appeals did apply the *Chamberlain* rule and that *Chamberlain* was used by the Court of Appeals to obliterate the inferences in the petitioner's case and reach its conclusion.

We start with the proposition that petitioner's testimony showed that the ground where he was ordered to do his job was soft, rubbishy, sandy, smouldering loose fill (7a, 19a, 22a, 49a). Petitioner was required to jack a portion of a gondola car weighing twenty-six tons, on that type of ground. He was hit on the head with the jack handle while jacking the car. We do not and cannot imagine that Chief Judge Biggs, Judge Goodrich and Judge Hastie, in the light of the decisions in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *McBride v. Toledo Terminal Railroad Company*, 354 U. S. 517, 77 S. Ct. 1398 (1957); and *Stinson v. Atlantic Coast Line R. Co.*, — U. S. —, 78 S. Ct. 136 (1957), would decide that upon such proof there was an "absence of evidence, either circumstantial or direct, tending to show that the negligence of the [respondent] had any influence or effect in causing petitioner's injuries"[8] unless the inference that the jack sank or tilted when the operation was done on such ground had for "some reason" disappeared.

The pivot of the opinion below was reached by the Court of Appeals when it spoke as follows:

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3. *Id.*, p. 7.
4. *Id.*, p. 5.
5. *Id.*, p. 7.
6. *Id.*, p. 7.
7. *Id.*, p. 12.
8. Petition, p. 23.

"And there was no such showing concerning the consistency of the ground that a sinking could properly be inferred *in the teeth of the uncontradicted affirmative evidence to the contrary.*"[9] (Emphasis supplied.)

If the court below had ended this sentence at the word "inferred", it would have been in factual error. But if *arguendo* that evaluation of the record were accurate, there then was a complete failure of proof of causation and the moment of adjudication had arrived. The court had finally to exercise its ultimate responsibility: extract the rule and apply it. On this hypothesis the controlling rule was clear and judgment for respondent would lie. *Atlantic Coast Line Railroad Company v. Collins,* 235 F. 2d 805 (C. A. 4, 1956), cert. denied 352 U. S. 942, 77 S. Ct. 265 (1956).

But the sentence did not end with the word "inferred," and the quotation unquestionably describes a record in a different posture than if no words followed "inferred". Recognizing this, the court below perceptively turned from the *Collins* rule to the only rule within whose four corners this record fits: *Chamberlain.* On this pivot the whole case was turned, and in its very next words the court below cited *Chamberlain* and then in a completely direct and open expression, explained exactly why it ruled as it did. This was its *ratio decidendi:*

"We conclude, *therefore,*[10] that there is no evidentiary basis for a rational inference that the alleged behavior of the jack handle was to any extent caused by the condition of the ground upon which it was being used."[11] (Emphasis supplied.)

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9. *Id.,* p. 20.

10. "3. For that reason, referring to something previously stated; because of that; on that ground; to that end; consequently; hence; as, they lost the wager; *therefore* they must pay." *Webster's New International Dictionary of the English Language* (Second Edition, Unabridged), p. 2621.

11. Petition, p. 20.

All of this, according to respondent, is the ". . . abstract proposition of law not suggested by the proofs . . ."[12]

Respondent asserts that the application of our reasoning process would prove ". . . that Mr. Justice Brennan was wrong" in *Herdman v. Pennsylvania Railroad,* 352 U. S. 518, 77 S. Ct. 455 (1957).[13] After diligently reading and repeatedly rereading respondent's argument in support of that assertion,[14] we regretfully conclude that it is incomprehensible. But whatever respondent's argument may mean, it is certainly plain that *Herdman* just has no place here. The two cases are simply not analogous. If they were, the lower court would have bottomed its decision on *Herdman,* which was decided the same day as *Rogers v. Missouri Pacific Railroad Co.,* 352 U. S. 500, 77 S. Ct. 443, (1957); *Webb v. Illinois Central Railroad Co.,* 352 U. S. 512, 77 S. Ct. 451 (1957); and *Ferguson v. Moore-McCormack Lines, Inc.,* 352 U. S. 521, 77 S. Ct. 457 (1957), instead of reaching back a quarter of a century to rely upon *Chamberlain.* By no process of logical reasoning can the rightness of our argument here prove *Herdman* wrong. The essential difference is simple and fundamental. There, petitioner agreed that the train stopped suddenly to avoid striking an automobile and so agreed that there was no negligence. Here, we do not concede that the jack did not sink, and hence did not agree that there was no causation.

Because it would have no legal or intellectual value, we forbear from commenting on respondent's conclusion that its own argument, now imputed to us, is "clever advocacy."[15]

Tacitly admitting that the evidence regarding the consistency of the ground was sufficient to support an inference of causation, respondent turns then to the petitioner's testi-

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12. Respondent's Brief, p. 1: "Questions Presented".
13. *Id.,* p. 8.
14. *Id.,* pp. 8-9.
15. *Id.,* p. 9.

mony and attempts to show that such testimony precludes that inference. Respondent accuses us in this instance of "a clever bit of sleight-of-hand" [16] when we say that such testimony referred to a time before the accident. We need only refer to the opinion of the court below to show that this testimony in no way precluded the inference that the jack tilted or sank at the time of the accident. The court said:

> "Neither he [the petitioner] nor his helper, whose back was turned, nor anyone else, saw or knows just what happened." [17]

Obviously, under those circumstances, neither petitioner nor anyone else could tell what happened to the jack at the time of the accident. Also, obviously, respondent has been unable to answer our quotation from *Rogers v. Missouri Pacific Railroad Co.*,[18] which holds that where there is uncertainty it is for the jury to resolve such uncertainty.

Finally, we earnestly believe that the opinion of the lower court shows beyond any doubt that the court meant to and did apply the rule in *Chamberlain* to defeat the petitioner's claim. Respondent nowhere argues for the merits of the *Chamberlain* rule as we interpret it and as the lower court interpreted it. It cannot.

CONCLUSION.

Respondent does not dispute that the question of the validity of the *Chamberlain* rule is eminently reviewable. Since we have shown indubitably that the *Chamberlain* rule was the heart of the decision below, the very fact that respondent now argues that it is not presented in this case is a tacit admission of its importance. The petition should be

16. *Id.*, p. 12.
17. Petition, p. 20.
18. *Id.*, pp. 8-9.

granted; *Chamberlain* should be overruled by name and the decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957

No. 915

MICHELE DESSI,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	5
1. Petitioner's Argument Concerning the *Chamberlain* Case *Interjects* a Theory Which Is Inapplicable Here	5
2. There Was No Evidence Circumstantial or Direct Tending to Establish Causation	9
CONCLUSION	14
APPENDIX—Plaintiff's Pre-Trial Affidavit	1b

TABLE OF CITATIONS.

Cases.

Page

Beezer v. Baltimore & Ohio Railroad, 203 F. 2d 954 (3rd Cir. 1953) 6

Herdman v. Pennsylvania Railroad, 352 U. S. 518 (1957) 8

Hoyt v. Central Railroad, 243 F. 2d 840 (3rd Cir. 1957) 6, 13

Lavender v. Kurn, 327 U. S. 645 (1946) 13

Lukon v. Pennsylvania Railroad, 131 F. 2d 327 (3rd Cir. 1942) 6

Pennsylvania Railroad v. Chamberlain, 288 U. S. 333 (1932) ..5, 6, 7

Rogers v. Missouri Pacific Railroad, 352 U. S. 500 (1957) 6, 9, 10, 13, 14

Smith v. Dunn, 224 F. 2d 353 (5th Cir. 1955) 6

Snyder v. Lehigh Valley Railroad, 245 F. 2d 112 (3rd Cir. 1957) 6

Thomas v. Conemaugh & Black Lick Railroad, 234 F. 2d 429 (3rd Cir. 1956) 6

Webb v. Illinois Central Railroad, 352 U. S. 512 (1957) 13

Widder v. New York, Chicago & Saint Louis Railroad, 235 F. 2d 752 (1956) 6

Yentzer v. Pennsylvania Railroad, 239 F. 2d 785 (3rd Cir. 1957) 6

Authority Cited.

Harvard Law Review Association, A Uniform System of Citation (9th Ed. 1955) p. 40 7

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957

No. 915

MICHELE DESSI,

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PENNSYLVANIA RAILROAD COMPANY,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Should this court grant certiorari to consider an abstract proposition of law not suggested by the proofs at trial and not discussed in the opinions of the District Court and of the Court of Appeals.

2. Should this court grant certiorari where petitioner's sole argument to justify his petition rests upon his statement that the jury found a causal connection between defendant's negligence and plaintiff's injury, and

(a) The jury did not pass on the question (the trial judge held that his charge failed properly to submit it);

(b) Every witness at trial, including petitioner himself, agreed that the hypothetical occurrence upon

which petitioner's counsel now predicate causal connection did not in fact occur; and

(c) The District Court said there was "absolutely no evidence" to support causation, and the Circuit Court held that there was no evidence, "either circumstantial or direct tending to show that negligence of the defendant had any influence or effect in causing plaintiff's injury"?

STATEMENT OF THE CASE

Petitioner suffered a head injury while at work and brought this action under the F.E.L.A. to recover for the neurosis which he says resulted (74a).[1] Both the District Court (Eastern District of Pennsylvania) and the Circuit Court (Third Circuit—Chief Judge Biggs, Judge Goodrich and Judge Hastie) held that there was no evidence whatever to raise an issue on causation. Judgment was accordingly entered for defendant.

The sole basis for the petition for certiorari rests upon the assertion that Judge Hastie applied an erroneous rule of law in reaching the Circuit Court's decision. To decide whether any such rule, right or wrong, was applied does not require a detailed examination of the facts of the case. It requires no more than a reading of the opinion, and disposition of the petition should turn, therefore, upon what the opinion says. Nevertheless, we believe this court should be informed of the misleading aspects of petitioner's statement of the case. It contains the following inaccuracies and omissions:

1. "The jury, after ample instructions by the trial judge, rendered a verdict for petitioner" (Petition p. 3).

1. In this brief page references without a letter refer to the petition for certiorari and appendix thereto, i.e. (5). References with the letter "a" refer to the printed appendix used in the Circuit Court, i.e. (5a).

The District Court held that the charge on causation *did not* properly present that issue to the jury (143a). In fact the charge on causation was so inadequate that the trial judge said a new trial should be awarded (143a). However, no disposition of the motion for new trial was entered on the docket since judgment was entered for defendant (147a). On appeal the Circuit Court found it unnecessary to consider the trial judge's decision that he had *not* given "ample instructions" on the crucial causation problem (23a). Accordingly, defendant's motion for a new trial is outstanding.

2. "In that situation the entire weight of the car is on the jack" (Petition p. 3). That is untrue. The witnesses, including plaintiff, agreed that only one corner of the car body was being raised a few inches (9a, 10a, 23a, 37a—see opinion of Circuit Court, 21).

3. On pages 3-4 petitioner describes in light most favorable to the theory he advances the composition of some of the ground next to the paint track. He fails to point out that he is basing his description upon evidence which was disputed at trial (140a-141a), that there was no evidence that the *particular* spot involved was in fact soft, and that there was evidence that that particular spot was solid (97a).

4. " . . . the union representative had complained that the ground there was unsafe" (Petition p. 4). Those complaints pertained to heavy work on the paint track (117a). The particular job involved was light work (99a, 118a).

5. On page 4 petitioner argues that coupled cars should not be jacked, that there was a "safe or safer method" of performing the job in question and that "proper and adequate equipment was available" elsewhere. Judge Hastie disposed of this contention in his Circuit Court opinion (21), and nowhere in the petition is it suggested that his decision on that point is incorrect.

6. On page 5 petitioner says that the trial judge charged the jury that it should return a verdict for defendant if it found the accident was due solely to petitioner's improper operation of the jack. No such charge was given as reference to the page of the record cited by petitioner will show (131a).

7. "The jury . . . obviously did find that . . . the unsafe condition of the ground caused the jack to sink . . ." (Petition p. 5). The jury made no finding on this point (see paragraph No. 1 above). Petitioner himself, as well as each of the other witnesses, testified the jack did not sink (23a, 96a, 97a, 108a, 109a, 116a, 117a).

8. The last two paragraphs of petitioner's Statement of the Case are arguments. They are arguments based upon counsel's ingenuity, not on the record in this case.

ARGUMENT

1. Petitioner's Argument Concerning the Chamberlain Case Interjects a Theory Which is Inapplicable Here.

Petitioner chooses to ignore the present case and seeks to intrigue this Court by forecasting monstrous results which he says would flow if *his* interpretation of *Pennsylvania Railroad v. Chamberlain*, 288 U. S. 333 (1932), were applied by trial and appellate courts. But the rule petitioner evolves from the *Chamberlain* case was not applied in the present case by the courts below, and as a matter of fact petitioner has not cited a single case where any court has interpreted *Chamberlain* the way he has.[2] In F. E. L. A. cases today the courts apply, just as the district and circuit courts did in this case, the rule Mr. Justice

---

2. The *Chamberlain* case does not stand for what petitioner says it does. Petitioner claims that *Chamberlain* holds that affirmative testimony must always prevail over circumstantial. What *Chamberlain* says is that where certain proved facts are consistent with equally plausible possibilities, it is not proper to say that one of the possibilities has been proved where "*positive* and otherwise *uncontradicted* testimony of *unimpeached* witnesses" (at p. 341, emphasis supplied) indicates that the possibility did not in fact exist. This is not the application of the broad rule petitioner gleans from the case. It is an extremely narrow rule, but it is clearly a rule of common sense and it has been applied consistently by the federal courts in all branches of litigation, e.g., *Smith v. Dunn*, 224 F. 2d 353, 357-8 (5th Cir. 1955). That the Third Circuit would apply no such rule as petitioner derives from *Chamberlain* is obvious from the decisions of that court in this field, decisions which consistently hold that even the slightest evidence of negligence or causation, whether direct or circumstantial, is for the jury. *Lukon v. Pennsylvania Railroad*, 131 F. 2d 327 (1942); *Beezer v. Baltimore & Ohio Railroad*, 203 F. 2d 954 (1953); *Thomas v. Concmaugh & Black Lick Railroad*, 234 F. 2d 429 (1956); *Widder v. New York, Chicago & Saint Louis Railroad*, 235 F. 2d 752 (1956); *Yentzer v. Pennsylvania Railroad*, 239 F. 2d 785 (1957); *Snyder v. Lehigh Valley Railroad*, 245 F. 2d 112 (1957); *Hoyt v. Central Railroad*, 243 F. 2d 840 (1957).

Brennan announced in *Rogers v. Missouri Pacific Railroad*, 352 U. S. 500 (1957).

Lest there be any mistake about respondent's position, we do not here challenge the general propositions which petitioner argues. Certainly if a case is proved by circumstantial evidence, that proof will not be wiped out by "affirmative" evidence produced by the other side. Certainly, in many instances, circumstantial evidence is as persuasive as direct evidence. But this case does not involve circumstantial evidence. Here both the trial judge and Judge Hastie for the Circuit Court held there was *no* evidence of causation. The trial judge said (141a):

> ". . . upon careful consideration I am satisfied that there is absolutely no evidence to show that plaintiff's injury resulted in whole or in part from any negligence of the defendant."

And again at 143a-144a, he said:

> ". . . there should be a judgment for the defendant notwithstanding the jury's verdict, by reason of the total lack of evidence to show any causal connection between defendant's alleged negligence and the plaintiff's injury."

The *Chamberlain* case is not even cited in the opinion. On appeal Judge Hastie made the Circuit Court's holding quite clear (23):

> "Accordingly, we hold that *the absence of evidence, either circumstantial or direct*, tending to show that negligence of the defendant had any influence or effect in causing plaintiff's injury, justified the entry of judgment notwithstanding the verdict in this case."

The *Chamberlain* case is not cited as authority for the holding which the court rests squarely on *Rogers* (21-22). At

one point in the opinion Judge Hastie did refer to *Chamberlain* but he preceded the citation with "Cf." (20).[3] He did not discuss the case, interpret it, or state what rule of law he would derive from it. We know only that the judges of the Third Circuit decided that *Chamberlain* was *not* controlling in the present situation but that it was worth comparing. We submit that it has required considerable intestinal fortitude for petitioner's counsel to tell this court that the court below "relied on", "applied", and "bottomed" the decision on *Chamberlain* (5, 8, 11, 12, 13).[4] Whether *Chamberlain* should or should not be overruled is a question which this Court may or may not choose to consider if it is properly presented for decision some time in the future. Clearly, that question is not presented by this case, for even if *Chamberlain* had been decided the other way, the present case would have been decided just as it was. A reading of the Circuit Court's opinion will show that.

By what, for the want of a better term, might be called "clever advocacy," petitioner has distorted Judge Hastie's thoughtful, able opinion into something it is not. What Judge Hastie termed "the absence of evidence" (23) petitioner calls his "circumstantial evidence". What Judge Hastie, in referring to the testimony of each of the wit-

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3. The Harvard Law Review Association, *A Uniform System of Citation* (9th Ed. 1955) explains "cf." as follows (p. 40):

> "'Cf.' is used before a case . . . expressing a legal proposition which, while only analogous, lends some support for the statement, conclusion or opinion of *law* in text . . . 'cf.' indicates that the material is related only by analogy and is simply to be compared therewith."

4. Some statements made in the petition as to the holding below are so contrary to what the Circuit Court did say that they seem to us to go beyond the limits of advocacy. These are examples:

> "The holding below that the jury is not free to draw a circumstantially supported inference . . ." (9).
>
> ". . . the rule of disappearing proof adopted by the court below . . ." (15).

nesses, including petitioner himself,[5] said was "all of the affirmative evidence on this point" (20) petitioner calls "respondent's affirmative testimony". Petitioner is thereby able to argue an illusion, that the Third Circuit allowed "respondent's affirmative testimony" to overcome petitioner's "circumstantial evidence".

If the reasoning process of petitioner's counsel were applied to one of this Court's recent opinions, *Herdman v. Pennsylvania Railroad*, 352 U. S. 518 (1957), it proves that Mr. Justice Brennan was wrong. In that case a train made an emergency stop to avoid hitting an automobile, and plaintiff, the conductor, was thrown in the caboose. The witnesses, plaintiff included, established those facts. This court through Mr. Justice Brennan said that "a jury question of negligence was not presented by the proofs" (at p. 520). According to petitioner's formula the decision was wrong. It is simply a matter of juggling terms. The fall in the caboose becomes "petitioner's affirmative testimony" (15). Since a sudden stop of a train *might* be due to negligent operation of an engine (just as a jack *might* sink into soft ground [6]), "petitioner's affirmative testimony" in turn creates "petitioner's circumstantial evidence" (14) of faulty operation, and all of this combined becomes "petitioner's proof" (16). The uncontradicted evidence that the stop was necessary to avoid striking an automobile becomes "respondent's affirmative testimony" (even though petitioner agreed it was true) which the jury, in exercising "its constitutional role as the judge of credibility and of ultimate truth" (15), could disbelieve. For this Court to

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5. Petitioner lifts out of context two sentences of Judge Hastie's opinion and seeks to disparage them (20). Judge Hastie there refers to petitioner's testimony as well as that of everyone else. We discuss petitioner's testimony in the second section of this brief.

6. And by the same token might *not*. The evidence here is that the kind of jacking operation involved can be safely performed even on a sandy beach if the jack is properly blocked (114a). Petitioner did the blocking in this case (23a).

have allowed "petitioner's proof" to be "obliterated" (16) by "respondent's affirmative testimony", and thus to cause "summary abolition of the right to prove a case by inference" (17), was a "massive invasion of the classic jury province" (17). That may be clever advocacy. Its helpfulness in the administration of justice is open to question. In the present case Judges Biggs, Goodrich and Hastie, exercised their experience and objectivity to determine that on this record plaintiff failed to produce any proof from which men "with reason" might conclude that the negligence complained of in any way caused or contributed to plaintiff's injury. Since petitioner does not question the Third Circuit's interpretation of *Rogers* and has been able to attack their collective judgment only by "clever advocacy" and not by pointing to any defect of substance, it is submitted that the petition should be denied.

2. There Was No Evidence Circumstantial or Direct Tending to Establish Causation.

In the District and Circuit Courts petitioner took the position that under *Rogers* he needed no evidence of causation. He argued that the jury could draw its own conclusions about causation quite irrespective of the proof, or the lack of it, on that point. For instance, he stated in the brief he filed with the Circuit Court:

> "Therefore, negligence having been established, the focal point of this appeal is causation. . . . And the Supreme Court of the United States has left no doubt that where negligence exists, it is for the jury alone, and not the court to determine its relation to the injury."

The Circuit Court, through Judge Hastie, recognized that under *Rogers* "the role of a defendant's negligence in helping bring about the injury may be small" (22), but concluded that this Court had not intended to eliminate the

necessity for some proof of a causal connection (21-22). Apparently petitioner is now ready to concede that Judge Hastie correctly analyzed Mr. Justice Brennan's opinion in *Rogers*, for the petition for certiorari abandons the early arguments, and petitioner now claims that he proved causation by "circumstantial evidence". Did he?

The theories of negligence advanced at trial by plaintiff's witnesses, his union claims representative and his divisional chairman, were afterthoughts which never appeared in the case prior to trial.[7] Although the trial judge thought that their testimony was incredible,[8] he ruled, and respondent of course agreed, that their testimony created jury issues as to negligence. Plaintiff claimed an unsafe place to work and unsafe procedures predicated on three things (130a-131a):

1. Approved procedure calls for a heavier jack or two or possibly three jacks;

2. It is not proper to jack a car coupled to other cars; and

3. The ground along the paint track was not as solid as elsewhere.

At no point in the petition is it explained to this Court how negligence #1 or negligence #2 might conceivably have caused a jack handle to fly up and hit plaintiff. Apparently

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7. The evidence of negligence brought out at trial was never mentioned during pre-trial discovery (21a-22a), was contrary to the pre-trial affidavit in which plaintiff said his injury was due to a defective jack (1b—appendix to this brief), and constituted a repudiation of the statement plaintiff gave the day of the accident in which he had said that the jack handle was out of the jack before the accident and said he had hit his head on the side of the freight car (21a, 125a, 139a). The union claims representative who developed the last-minute negligence theories admitted that as a witness he was "trying to explain to the jury any way [he could] how the company did something wrong" (42a).

8. He said (143a): "I am satisfied that it would be a miscarriage of justice to permit plaintiff to recover damages against the defendant on the evidence here presented."

petitioner concedes that Judge Hastie correctly decided that those claims of negligence had nothing to do with the accident, for there is no argument in the petition that there was "circumstantial evidence" that such negligence played any part, however small, in causing plaintiff to hit his head. Petitioner now argues that he proved that negligence #3 (soft ground) was the cause of the accident.[9] He concedes that this argument could have validity only if the jack sank into the ground and tilted (8, 15). Otherwise the movement of the jack handle—if it in fact moved on this day [10]—could not be related in any way to the consistency of the ground and would have to be attributed to some other cause wholly unrelated to the negligence claimed. For instance,

(a) Plaintiff might have failed properly to engage the safety dog (although considerably larger, the jack used was similar to the common ratchet-type automobile jack);

(b) Plaintiff might inadvertently have disengaged the holding pawl as he tried to take the jack handle out of jack (110a);

(c) Perhaps the locking dog was not "perfect". If not "perfect", the handle could come up (26a, 50a-51a);[11]

(d) Perhaps some foreign matter or an undiscovered defect in the jack caused it to operate improperly this one time (40a-41a).

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9. In the entire argument (pages 8 through 18 of the petition) petitioner mentions only the claim of negligence stemming from the condition of the ground. On page 5 of the petition the other claims of negligence are mentioned in passing, but petitioner does not try to demonstrate upon what facts a person "with reason" could determine that the "failure to uncouple the cars" or the "insufficiency of the jacking equipment" (which the circuit court held was not "insufficient" at all—21) could conceivably have had anything to do with this accident. Apparently he considers such points impossible to sustain.

10. See footnote 7, *supra*.

11. No liability could be predicated on this possibility (21).

As against these "no-liability" possibilities petitioner now argues that the circumstances show that the jack sank into the ground, tilted and became off-sprung. He makes that argument in spite of the fact that at trial he admitted, and every eye-witness agreed without equivocation, that the jack did not do any such thing. Plaintiff himself testified (23a):

> "Q. You placed the jack?
> A. Yes, sir.
> Q. And you put a block under it?
> A. Yes, sir.
> Q. You were satisfied that jack was on a solid spot?
> A. On top of the block and the ground could cave in.
> Q. The ground didn't cave in, did it?
> A. No, it didn't."

He also said that the jack held the car and completed the job (23a):

> "Q. And after you put the jack under it and started to jack it up, you got the jack up far enough the wedge would come out.
> A. Yes, sir.
> Q. And the jack was holding it up?
> A. Yes, sir."

Plaintiff performed the entire jacking operation. He started it and he finished it.[12] He said the jack did not sink into

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12. Petitioner does not mention this testimony either in the statement of the case or in the body of the argument. By a clever bit of sleight-of-hand his counsel attempt to remove this testimony from the case by saying in a footnote (fn. 2, p. 8) that it referred to a time "before the accident". Certainly it did, if "before" means a second before and if "accident" means the precise instant petitioner hit his head. What petitioner did see, did remember and did testify to *without equivocation* was that *he* placed the jack, that *he* jacked the car all the way up, and that *after* he had jacked the car the jack was still holding it up. If the jack were going to sink into soft ground, it would have had to do so during the time petitioner himself was right there operating it and observing it. He said it did not

the ground. Each of the other witnesses said the jack did not sink into the ground (96a, 97a, 108a, 109a, 116a 117a). There was no conflict in the evidence. All the witnesses, including plaintiff, agreed that the jack did not do what petitioner's counsel, and his counsel alone, now claim it did.

The courts within the Third Circuit, following the decisions of this Court,[13] recognize that juries are to be given great latitude in determining questions of causation in Federal Employers' Liability Act cases, *Rogers v. Missouri Pacific Railroad,* 352 U. S. 500 (1957); *Webb v. Illinois Central Railroad,* 352 U. S. 512 (1957). Indeed, they follow the admonition of this Court that speculation by the jury is permitted where the evidence gives rise to conflicting inferences and fair-minded men could reasonably draw different conclusions, *Rogers v. Missouri Pacific Railroad,* 352 U. S. 500, 507 (1957); *Lavender v. Kurn,* 327 U. S. 645, 653 (1946). They recognize that a jury may find for the plaintiff on the basis of purely circumstantial evidence, *Rogers v. Missouri Pacific Railroad,* 352 U. S. 500, 507 (1957). "Circumstantial evidence" may hold a slightly different meaning for each lawyer and judge. We submit, however, that the term does not include a guess contrary to what every witness, plaintiff's and defendant's alike, testified the truth really was. This Court has not yet held that jurors may ignore uncontradicted testimony from both parties and decide a case contrary to established fact. Clearly, the views of the district and circuit courts in this case were correct. Here there was *no* evidence, circumstantial or otherwise, which could "with reason" lead

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sink. His counsel is unable to advance an argument that Judge Hastie was wrong if the argument must take the *evidence* into account, so the crucial part is hidden in a brief footnote. Eleven pages of argument are constructed ignoring that it exists and pretending that petitioner's case and respondent's case conflicted on the crucial point.

13. The care with which the Third Circuit applies this court's rulings to give every protection to injured employes is demonstrated by *Hoyt v. Central Railroad,* 243 F. 2d 840, 842 (1957), in which all this court's recent decisions are analyzed and correctly applied.

fair-minded men to decide that petitioner's jack sank in the ground, tilted and was off-sprung. All the witnesses, petitioner included, agreed that it did not do that.

CONCLUSION.

The Circuit Court of Appeals for the Third Circuit disposed of this case in accordance with the doctrine of *Rogers v. Missouri Pacific Railroad,* 352 U. S. 500 (1957), and petitioner does not challenge the Circuit Court's interpretation of that case. The grounds upon which petitioner seeks a review in this court are theoretical only; they do not arise under the facts of this case and were not raised in the courts below. Therefore, the petition should be denied.

Furthermore, the decision of the Circuit Court that there was no evidence, either circumstantial or direct, tending to establish causation was a correct decision on the evidence presented.

Respectfully submitted,

PHILIP PRICE,
F. HASTINGS GRIFFIN, JR.,
BARNES, DECHERT, PRICE, MYERS & RHOADS,
Attorneys for Respondent.

May, 1958

APPENDIX.

PLAINTIFF'S PRE-TRIAL AFFIDAVIT.

DONALD J. FARAGE, being duly sworn, deposes and says that:

1. He is of counsel for the plaintiff;

2. Plaintiff has brought an action under the Federal Employers Liability Act averring that he suffered injuries caused by a defective jack which he was using at the time the accident occurred, while in the course and scope of his employment, when the jack fell out and struck the plaintiff;

3. Obviously the condition of the jack is a most relevant and material issue in the case;

4. The jack is within the exclusive possession and control of the defendant;

5. At the time of the accident, and prior thereto, the plaintiff never had the occasion or opportunity to examine the inside parts of the said jack, in order to determine whether it was in good condition or was defective;

6. The plaintiff, by his attorneys, wishes to have the defendant produce the jack involved in this accident, for inspection by the plaintiff, his attorneys and by an expert of the plaintiff's choosing, it being understood that the defendant shall be privileged to be present at the time of such inspection or examination;

WHEREFORE, plaintiff files the attached Motion to compel defendant to produce said jack for such examination at a time and place mutually convenient to the parties.

DONALD J. FARAGE,
Of Counsel for Plaintiff.

Subscribed and Sworn to before me this 3rd day of December, 1954.

NANCY SHAW,
Notary Public.
NANCY SHAW
Notary Public, Philadelphia
Philadelphia County
My commission expires February 2, 1957.